

No. 2967

IN THE
**United States Circuit Court
of Appeals**

For the Ninth Judicial Circuit.

NATIONAL SURETY COMPANY, a corporation,

Plaintiff in Error,

VS.

ISAAC BLUMAUER, W. DEAN HAYS, and
ORA J. HAYS, his wife, T. F. MENTZER
and ELIZABETH E. MENTZER, his wife,
A. D. CAMPBELL and JESSIE E. CAMP-
BELL, his wife, DAVID COPPING and
EVA COPPING, his wife,

Defendants in Error.

FILED
SEP 12 1947
F. D. MONKTON,
CLERK

*Upon Writ of Error to the United States District
Court of the Western District of Wash-
ington, Southern Division.*

BRIEF OF DEFENDANTS IN ERROR

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STATEMENT OF THE CASE.

The facts as stated by plaintiff in error are substantially correct. The statement is not complete, however, and avoids, we think, the features of the case which controlled the decision of the Court below, and which in our opinion must con-

trol the decision here. The statement includes many matters which in our opinion were not considered by the Court below, and which we think will not be considered here.

The Court will bear in mind at the outset that plaintiff's action is based solely on instruments in writing, unaided by any acts *in pais* of the parties, or estoppel. In view of the statement as made by the plaintiff in error it is proper that we call attention to the issues as made by the pleadings.

THE PLEADINGS

It is alleged in the complaint, and admitted in the answer, that on the 22nd day of June, 1911, the State Bank of Tenino, executed its bond to Robert Marr, as Treasurer of Thurston County, Washington, which for the convenience of the Court we will print in full, as follows:

(We will italicize the portions of this bond which plaintiff in error did not refer to or set forth in its brief.)

“KNOW ALL MEN BY THESE PRESENTS, That we, THE STATE BANK OF TENINO, of Tenino, Washington, as principal, and the National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto Robert Marr, individually and as Treasurer of the County of *Thurston* and as County Treasurer of the County of *Thurston*, State of Washington,

in the full and just sum of Five Thousand (\$5,000.00) Dollars, lawful money of the United States for the payment of which well and truly to be made, the said principal and surety respectively bind themselves, their and each of their successors and assigns, jointly and severally firmly by these presents.

SIGNED, SEALED AND DELIVERED at Seattle, Washington, this 22nd day of June, A. D. 1911.

THE CONDITION OF THIS OBLIGATION IS SUCH, that, whereas the said Robert Marr has been elected and has qualified as Treasurer of Thurston County, State of Washington, and as such treasurer, at the special instance and request of the said State Bank of Tenino, has deposited, or may hereafter, from time to time, deposit and place in charge of the said principal hereinbefore named, certain moneys, checks, etc., for the custody or for the proceeds of the face value of which the said treasurer, as such, may be responsible, and

NOW, THEREFORE, if the said principal hereinbefore named shall in due and ordinary course of business, promptly pay to the said treasurer upon demand and presentation of proper and valid checks therefor, in the usual and ordinary hours of business, all moneys and proceeds of all checks, etc., which have been or shall hereafter be deposited with, trans-

ferred to or placed in charge of the said principal, by or on behalf of the said treasurer, and shall keep and hold harmless the above named Robert Marr, individually, and as such treasurer, from all liability, loss and damage which may arise, or accrue against the said treasurer by reason of the deposit or delivery of said funds, checks, etc., or any part thereof as aforesaid, and shall well and truly fulfill and perform any and every duty and obligation arising out of or connected with the deposit or delivery of funds, as aforesaid, by and on behalf of said treasurer, then this obligation to be void; otherwise to be and remain in full force and effect.

PROVIDED, HOWEVER, upon the further following express conditions:

FIRST: That in the event of any default on the part of the principal, written notice thereof with a verified statement of the facts showing such default, and the date thereof, shall within ten (10) days after the knowledge of such default, has been received by the said Robert Marr, or his representatives, be mailed to the surety at its office in New York City.

SECOND: That the surety shall not be liable for any deposits made after any such default shall have come to the knowledge of said Robert Marr or his representatives.

THIRD: That the said surety shall not be liable hereunder except for the loss of moneys

belonging to the said Robert Marr, treasurer, and which shall have been deposited with the aforesaid principal by the said Robert Marr, as treasurer aforesaid, or to his credit as such treasurer.

FOURTH: That no such suit, action or proceeding shall be brought or instituted against the surety upon, or by reason of any default, of the principal after the expiration of sixty (60) days after such default, or in any event, after the 22nd day of June, 1912.

FIFTH: That the surety shall have the right to terminate its suretyship under this obligation by serving notice of its election so to do upon said 'obligee' or his or its lawful representatives, and thereupon the said surety shall be discharged from any and all liability hereunder for any default of the principal after the expiration of thirty days after the service of such notice.

SIXTH That, if the obligee shall at any time hold concurrently with this bond, or represent to the surety, in any statement to it, that it does or will at any time hold concurrently with this bond, or any other bond or collateral as guarantee of security from or on behalf of the principal, the obligee shall be entitled, in event of loss as hereinbefore stated, to claim hereunder only such proportion of the loss as the penalty of this bond bears to the sum of the penalties of all bonds and amount of col-

lateral carried, or to be carried on the principal's behalf, and in no event shall the surety be liable for any sum in excess of the penalty of this bond."

(Record, pp. 10-12.)

And to indemnify plaintiff against loss because of its executing such depository bond, defendants executed to it their indemnity bond, as follows:

(We have italicized the portions of the depository bond not set forth, or referred to by plaintiff in error in its brief).

"THIS AGREEMENT WITNESSETH :
That Whereas, we the undersigned have requested the NATIONAL SURETY COMPANY, a corporation under the laws of the State of New York (hereinafter called the Company), to sign and execute a certain bond or undertaking in the penalty of Five Thousand Dollars (\$5,000.00) in behalf of the State Bank of Tenino in favor of the Treasurer of Thurston County, Washington, effective June 22, 1911, covering deposits of the said Treasurer, in said bank, *reference to which bond or undertaking made for the purpose of certainty and a copy of which instrument is or may be hereto attached; and*

WHEREAS, The Company has signed and executed, or is about to sign and execute the said instrument upon condition of the execution

hereof and upon the security and indemnity hereby and herein provided,

NOW THEREFORE, In consideration of the premises of the sum of One Dollar in hand paid to us by the Company, the receipt whereof is hereby acknowledged, we, the undersigned, hereby covenant and agree with the Company, its successors and assigns, in manner following:

FIRST: That we *will in* cash to the Company as its principal in the City of New York, or to such agent or representative of the Company as the Company may in writing designate, the sum of Twenty-five and no |100 (\$25.00) Dollars, which is agreed by the undersigned to be the Company's compensation for the accommodation afforded the undersigned by the execution of said instrument by the Company, said sum to be paid to the Copmany annually in advance on the Twenty-second day of June in each and every year during the time the Company shall be and continue liable upon said instrument, and until the Company shall have been fully discharged and released from any and all liability upon the said instrument, and all matters arising therefrom, and until there shall have been furnished to the Company, at its principal offices in the City of New York, due and satisfactory proof by evidence legally competent, of such discharge and release.

SECOND: That we will at all times indemnify the Company, and hold and save it harmless from and against any and all demands, liabilities, loss, damage or expense of whatsoever kind or nature, including counsel and attorney's fees, which it shall at any time sustain or incur by reason, or in consequence of having executed the said instrument and that whenever any claim or claims shall have been made upon the Company under the said instrument, if in the judgment of the Company it is determined that such claim or claims should be paid, we covenant, promise and agree to pay over in cash to the Company upon its demand therefor, the amount or amounts of such claim or claims, and if the Company deny liability concerning any claim or claims and suit or suits be brought against the Company, under said instrument to recover the amount of said claim or claims, or any other proceeding be taken thereon involving the Company, whether the suits and proceedings be against the principal named in the said instrument, and the Company jointly, or against the Company alone, we covenant and agree to defend said suits and proceedings to a conclusion at our own expense or to permit the Company, if it so elect, to place the defense of such suits and proceedings in the hands of its own attorneys or counsel, in which latter event we covenant, promise and agree to pay

over to the Company upon its demand such sum or sums of money and to defray the expenses of conducting the defense of said suits and proceedings; and further we covenant and agree to satisfy and discharge any and all judgemnts recovered against the Company under said instrument as soon as the same shall be entered or docketed unless an appeal be taken and bond or bonds to secure or stay the collection of such judgment or judgments be procured by the undersigned and filed as required by law, and if final judgment be recovered or entered against the Company after the decision of such appeal, we covenant and agree to forthwith satisfy and discharge every such final judgment without requiring the Company to take any steps whatsoever thereon; and should judgment be entered against the principal in said bond and the Company, or against the Company alone, in either event, should the undersigned not procure an appeal to be taken and furnish bond or bonds to secure, supersede or stay the collection of such judgment, the Company may, if it elect, pay said judgment, whereupon we agree forthwith to repay the Company the amount of said judgment so paid, together with legal interest thereon from the date of payment to the date of such re-payment; that we will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts

of money not hereinbefore provided for, which the Company or its representatives shall pay, or cause to be paid, or become liable to pay under its obligations upon said instrument, or as charges and expenses of whatsoever kind or nature, including counsel and attorney's fees by reason of the execution thereof, or in connection with any litigation, investigation or other matters connected therewith, such payment to be made to the Company as soon as it shall have become liable therefor, whether it shall have paid out said amount or any part thereof, or not.

That in any settlement between us and the Company the vouchers or other proper evidence showing payment by the Company of any such liability, loss, damage, or expense, shall be prima facie evidence against us of the fact and amount of our liability to the Company, provided that such payment shall have been made by the Company in good faith, believing that it was liable therefor.

THIRD: That in case of any action at law, suit in equity, or other proceeding be commenced or notice of such action, suit or proceeding be served upon the undersigned, affecting the liability of the Company upon said instrument, or growing out of any matter connected herewith, or on account of which the said instrument was given we will immediately

notify the Company at its principal offices in the City of New York.

FOURTH: The Company may at any time hereafter take such steps as it may deem necessary or proper to obtain its release from any and all liability under said instrument, or under any other instrument within the meaning of Section Fifth hereof, and to secure and further indemnity itself against loss, and all damages and expenses which the Company may sustain or incur or be put to in obtaining such release, or in further securing itself against loss, shall be borne and paid by us.

FIFTH: That no act or omission of the Company in notifying, amending, limiting or extending the instrument so executed by the Company shall in any wise effect our liability hereunder, nor shall we or any of us be released from this obligation by reason thereof; and we agree that the Company may alter, change, or modify, amend, limit or extend said instrument and may execute renewal thereof, or other and new obligations in its place or in lieu thereof, and without notice to us being expressly waived, and in any such case, we and each of us shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, limited or extended instrument or such renewals thereof, or other or new obligations in its place or in lieu thereof, whenever and as often as made, as

fully as if such instrument were described at length herein.

SIXTH: That it shall not be necessary for the Company to give us or either of us, notice of any act, fact, or information coming to the notice or knowledge of the Company concerning or affecting its rights or liability under any such instrument by it so executed, or our rights or liabilities hereunder, notice of all such being hereby expressly waived.

SEVENTH: That this agreement shall bond not only the undersigned jointly and severally, but also our respective heirs, executors, administrators, successors and assigns (as the case may be), until the Company shall have executed a release under its corporate seal, attested by the signature of its officers proper for the purpose.

EIGHTH: That these covenants as also all collateral securities or indemnity, if any, at any time deposited with or available to the Company concerning any bond or undertaking executed for or at the instance of us, or any of us, at the option of the Company, be available in its behalf and for its benefit and relief as well concerning any or all former and subsequent bonds or undertakings executed by us, or at the instance of us, or any of us, as concerning the bond or undertaking such covenants, collateral securities or indemnity shall have been made, deposited or given.

NINTH: It is distinctly covenanted and agreed that it is true and intent meaning of the provisions of this instrument among other things, that immediately upon any default on the part of the principal in said bond in performing any of the obligations thereof, or immediately upon any claim being made upon the Company, the undersigned shall pay over to and deposit with the Company in cash, the full amount of moneys or the equivalent thereof, with accrued interest, if any, alleged by the holder of said bond to be in the hands of said principal or the penalty of said bond.

IN WITNESS WHEREOF, We have hereunto set our hands and affixed our seals this 22nd day of June, 1911."

(Record, pp. 13-19.)

On June 22, 1914, and without taking any further, other or additional indemnity from defendants, plaintiff in error executed a new depository bond to W. H. Britt, then Treasurer of Thurston County, Washington, as follows:

"KNOW ALL MEN BY THESE PRESENTS, That the State Bank of Tenino as Principal, and National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and authorized to transact business in the State of Washington, as surety, are firmly held and bound unto W. H. Britt, Treasurer of the

County of Thurston, State of Washington, in the sum of Five Thousand and no |100 Dollars (\$5,000.00), for the payment of which, well and truly to be made we hereby bind ourselves, our and each of our successors and assigns, jointly, firmly by these presents.

Dated this 22nd day of June, A. D. 1914.

WHEREAS, the said Principal, State Bank of Tenino, has been designated by W. H. Britt, Treasurer of Thurston County, as a depository of the current funds in the hands or possession of the said Treasurer, W. H. Britt, to be deposited in the said Bank; the amount whereof shall be subject to withdrawals, or diminution by said Treasurer, as the requirements of said County shall demand, and which amount may be increased or decreased as the said Treasurer may determine and

WHEREAS, the said Bank, in consideration of such deposit and of the privilege of keeping same, has agreed to pay the County of Thurston, State of Washington, interest on said sum upon the average daily balance the said Bank shall have on deposit for the month, or any fraction thereof next preceding the crediting of said interest, which interest shall be computed and credited to the account of W. H. Britt, Treasurer of said County of Thurston, State of Washington, and shall become thenceforth a part of such deposit.

This provision is not contained in first bond.

NOW, THEREFORE, if the said State Bank of Tenino shall at the beginning of every month render to the Treasurer of the County of Thurston, State of Washington, a statement showing the daily balance of such County moneys held by it during the month next preceding and the interest thereon, and how the same has been credited, and shall well and truly keep all such sums of money so deposited, or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of W. H. Britt, Treasurer as aforesaid, and shall pay over the same or any part thereof, upon the check or written demand of said Treasurer, or to his successor in office, and shall calculate, credit and pay such interest, as aforesaid, and shall in all respects save and keep the said County, and the County Treasurer of the said County, harmless and indemnified for and by reason of the making of said deposit or deposits, and shall in all respects comply with House Bill No. 90, entitled, 'An Act regulating the keeping and deposit of public funds in Banks by the several Treasurers of the State of Washington,' passed by the Legislature of the State of Washington at its tenth regular session, in the year 1907, then this obligation shall be void and of no effect, otherwise to be and remain in full force and effect.

PROVIDED:

1. That the National Surety Company, Surety on said bond, shall have the right to terminate its liability under this obligation by serving notice of its election so to do upon the said Treasurer, and the said Surety shall be discharged from any and all liability hereunder for any default of the said State Bank of Tenino, Principal occurring after the expiration of thirty (30) days after the service of such notice.

2. The Surety shall only be liable for such proportion of the total loss or damage sustained by said Obligee, by reason of any default of the Principal embraced within the terms of this bond, as the penalty of this bond shall bear to the total sum of all bonds and securities which may be given to secure the deposits above referred to, and in no event shall the Surety hereunder be liable for any sum in excess of the penalty of this bond."

(Record, pp. 21-23.)

And received a release in writing of the first depository bond executed by it. It was after the first bond had been released and while this second depository bond was in force, and during the month of September, 1914, that W. H. Britt, as Treasurer of Thurston County, Washington, suffered a loss of moneys deposited under its protection in the State Bank of Tenino, and upon a demand being

made by Britt as such Treasurer on plaintiff under the terms of the last depository bond, plaintiff paid a proportion of the loss amounting to \$4,327.87, to recover which it brought this action against defendants under their indemnity agreement given in connection with the first depository bond, given by the Bank to Marr as County Treasurer. The complaint being a straight declaration upon the written instruments themselves.

(Amended Complaint, Record, pp. 3-9.)

The defendants, Blumauer and Hays and wife (Blumauer being President, and Hays Vice-President and Cashier of the defunct State Bank of Tenino), defaulted, the other defendants answered putting in issue the material allegations of the complaint and pleading affirmatively as a first affirmative defense that Robert Marr, was on June 22, 1911, Treasurer of Thurston County, Washington, and that the State Bank of Tenino was a depository of certain funds belonging to him as such Treasurer, and that plaintiff in error executed its certain depository bond on that date. That the term of office of Robert Marr terminated on the 8th day of January, 1913, and that by its terms and conditions said bond terminated and expired on that day. That defendants executed their certain indemnity bond to plaintiff in error to indemnify it against loss by reason of its having executed said depository bond to Marr as such Treasurer. Further alleges that the State Bank of Tenino upon demand and pre-

sentation of proper and valid checks paid all moneys deposited therein by said Marr as such Treasurer, and in all respects complied with the conditions of the bond as provided by its terms.

Defendants for a second affirmative defense set forth substantially the same facts, and pleaded in addition thereto a written release, which was not set forth in the answer, but which was introduced in evidence, and is, as follows:

“National Surety Company,
New York.

Gentlemen:

As surety on that certain depository bond, dated June 22, 1911, in behalf of The State Bank of Tenino, in favor of Robert Marr, Treasurer, Thurston County, Washington, in the penalty of \$5,000.00, you are released from further liability thereunder, from and after the 22nd day of June, 1914.

W. H. BRITT,

Treasurer, Thurston County, Wn.”

(Release, Record, p. 116.)

(Amended Answer, Record, pp. 32-42.)

The reply is a simple denial of the allegations of the amended answers.

(Reply, Record, pp. 43-46.)

THE FACTS.

The Court will bear in mind that there is no claim in the pleadings that defendants in error here

placed such a construction, or any construction, on the indemnity agreement as to cause it to extend to any other depository bond than that executed on June 22, 1911. There is nothing in the evidence whatever to show that plaintiff in error acted upon the assumption of anything outside of the terms of the written indemnity itself, and there is no claim in the pleadings and no fact established by the evidence that the indemnitors here, Campbell, Mentzer and Copping, or either of them, ever did one act or thing that might be construed as persuading plaintiff in error that they so regarded their indemnity agreement. There is absolutely no evidence that they, or either of them, made any representations to the plaintiff in error that could in any manner have led it to believe that they intended their indemnity agreement to cover the second depository bond, the one under which plaintiff suffered its loss. None of the defendants in error ever at any time communicated with plaintiff in error or with either or any of the County Treasurers; neither did any of them have any interview with any person representing plaintiff in error. In fact none of them ever saw or spoke to any officer or agent of plaintiff in error as to any transaction in connection with the depository bonds of the State Bank of Tenino, except when plaintiff in error obtained its indemnity agreement in the first instance in connection with the first depository bond to Robert Marr as Treasurer.

Plaintiff in error has in its statement of the case

adroitly set forth certain correspondence between the agents of the bonding company and the State Bank of Tenino, and the Bank and the bonding company. We can hardly understand its purpose in doing this, as there is no evidence in the record that the contents of this correspondence, or any part of it, was ever known to any of the defendants. Defendants in error made seasonable objections to the introduction of all of this evidence as shown by the record.

(Record, pp. 53-81.)

ARGUMENT.

As stated in the beginning plaintiff in error endeavors to make much of the written correspondence between the bank, the bonding company and W. H. Britt, as County Treasurer, and really argues its case on the theory that defendants in error here are liable on the grounds of an estoppel *in pais*.

(See Plaintiff's Brief, pp. 33-36-41-42.)

Despite the fact that there is not one scintilla of evidence to show that any of the defendants in error here had anything to do with said correspondence, or knew of its existence. If as a matter of fact some of the defendants were officers of the bank, and plaintiff claims that such relationship in any wise affected their liability under the indemnity agreement, it must be by acts on their part constituting an estoppel, and to avail itself of this plaintiff would have to specially plead it.

It is elementary that estoppel *in pais* means matters of fact as distinguished from matters of record, or conventional writing, or rather includes all forms of estoppel not arising from a record, from a deed, or from a written contract (16 Cyc. 681, and cases cited). The action here, as has been pointed out, is strictly upon a written contract, and not upon estoppel *in pais*, nor is such estoppel nor anything *de hors* a written contract alleged.

It is equally as elementary that when reliance is placed upon the elements of estoppel rather than a written contract, or, in conjunction with a written contract for that matter, the estoppel must be specially pleaded.

16 Cyc. 808, and cases cited.

Walker vs. Baxter, 6 Wash. 244.

Jacobs vs. Puyallup First Nat. Bank, 15 Wash. 358.

32 Cyc. 77.

Welsh vs. Seymour, 28 Conn. 387.

In that case the president of a corporation gave a bond conditioned for the faithful performance of his duties, which bond was signed by certain of the directors of the corporation whose duty it was to see that a proper bond was given. The Court held that insofar as the liability of those directors signing as sureties was concerned it depended upon the strict letter of their contract independent of the

consideration that they were directors and stockholders of the corporation.

In view of the state of the pleadings in this case and the evidence, all of the correspondence passing between plaintiff in error, the State Bank of Tenino, and W. H. Britt, as County Treasurer, is immaterial. We will therefore not devote any further space to those matters, but will proceed, as did the trial court, and as we think this Court must, on the theory that the liability, if any, of the defendants in error here is measured by the letter of their contract alone.

It is elementary that the relation of banker and depositor is that of debtor and creditor. It was the creation of that relationship between Robert Marr, as Treasurer of Thurston county, Washington, and the State Bank of Tenino, which gave rise to the agreement out of which this action arises.

Permit us here to briefly indulge in a homely illustration of the situation:

The State Bank of Tenino said to the National Surety Company, we want to get Five Thousand Dollars from Robert Marr, Treasurer of Thurston County, Washington, and we want you to go good for that amount. The National Surety Company said to the State Bank of Tenino, all right, we will do that, providing you indemnify us against loss under the surety agreement which we give to the State Bank of Tenino. In other words, we will give

you a letter of credit addressed to Robert Marr, County Treasurer of Thurston County, Washintgon, by which you may obtain credit of him in the sum of Five Thousand Dollars, for the payment of which we will stand sponsor. This was communicated to the indemnitors and they in turn said to the National Surety Company, all right, you give the letter of credit to the bank, and if you suffer any loss by reason of doing so we will make such loss good to you.

Now, let us see what the National Surety Company agreed to do, and in the doing of which defendants agreed to indemnify it. The bond executed June 22nd, 1911 (Exhibit "A," Record, p. 10, omitting formal parts), provides that the National Surety Company is "held and firmly bound unto Robert Marr, individually and as County Treasurer of the County of Thurston, State of Washington, in the full and just sum of Five Thousand Dollars * * *" which it binds itself to pay on the following conditions:

"Whereas, the said Robert Marr has been elected and has qualified as Treasurer of Thurston County, State of Washington, and as such Treasurer at the special instance and request of the State Bank of Tenino has deposited, or may hereafter from time to time deposit * * * certain moneys * * * for the custody, or for the proceeds of the face value of which said Treasurer as such may be

responsible. * * * Now if the bank shall in due and ordinary course of business promptly pay to the said Treasurer, upon demand and presentation of proper and valid checks therefor, in the usual and ordinary course of business, all moneys, etc. * * * deposited * * * by or on behalf of said Treasurer, and shall keep and hold harmless * * * the above named Robert Marr individually, and as such Treasurer, from all liability, loss and damage * * * by reason thereof * * * then the obligation to be void, provided, however, upon the further following express conditions:”

The first and second conditions refer to default, and are immaterial here.

The third condition, which it will be observed counsel for plaintiff in error inadvertently omitted to set forth in his brief (Brief, p. 6), reads as follows:

“THIRD: That the said surety shall not be liable hereunder except for the loss of moneys belonging to the said Robert Marr, treasurer, and which shall have been deposited with the aforesaid principal by the said Robert Marr, as treasurer aforesaid, or to his credit as such treasurer.”

(Record, p. 12.)

The fourth, fifth and sixth conditions have no bearing on the case.

It is plain that the National Surety Company by an *express condition* of its undertaking provided that it should not be liable for the loss of any moneys belonging to any other treasurer than Robert Marr, and that it should not be responsible for any moneys deposited in the State Bank of Tenino by any other treasurer than Robert Marr. It is impossible to make this any plainer than as expressed by the parties themselves in this third express condition of their letter of credit. (If we may be permitted to use that term.)

Now, what did the indemnitors undertake and agree to do? Exhibit "B" (Record, p. 13), the indemnity agreement executed by them, and acknowledged by one of them, Isaac Blumauer, on June 24, 1911, two days later, when it became a binding agreement and being the only indemnity agreement executed by them, refers to the depository bond as being executed at their request, effective June 22nd, 1911, "covering deposits of the said treasurer, in said bank, reference to which bond or undertaking made for the purpose of certainty and a copy of which instrument is or may be hereto attached; and, whereas the company has signed and executed * * * the said instrument upon condition of the execution hereof, and upon the security and indemnity hereby and herein provided."

(Record, p. 13-14.)

The first condition refers to the payment of

the premium. The second condition is a general condition not necessary to consider here. The third and fourth conditions are similar. The fifth condition, being the one upon which plaintiff in error chiefly relies, provides, as follows:

“FIFTH: That no act or omission of the Company in modifying, amending, limiting or extending the instrument so executed by the Company shall in any wise affect our liability hereunder, nor shall we or any of us be released from this obligation by reason thereof; and we agree that the Company may alter, change, or modify, amend, limit or extend said instrument and may execute renewal thereof, or other and new obligations in its place or in lieu thereof, and without notice to us being expressly waived, and in any such case, we and each of us shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, limited or extended instrument or such renewals thereof, or other or new obligations in its place or in lieu thereof, whenever and as often as made, as fully as if such instrument were described at length herein.”

(Record, pp. 17-18.)

The instrument so executed by the Company was one by which it expressly stipulated that it should not be laible, except for the loss of moneys belonging to said Robert Marr, as Treasurer, which

should be deposited with the State Bank of Tenino by said Robert Marr as Treasurer, or to his credit as such Treasurer. Now, it had a right under the fifth condition of the indemnity agreement to alter, change or modify, amend, limit or extend that obligation, or renew it, or to execute a new one in its place, or in lieu of it, to Robert Marr, as Treasurer, not to his "successor." The obligation to which the provision referred particularly excepted every other treasurer, because it says, "said surety shall not be liable hereunder, except for the loss of moneys belonging to the said Robert Marr, Treasurer, and which shall be deposited by said Robert Marr as Treasurer, or to his credit as Treasurer."

If it had been intended to extend this right to the execution of like or similar instruments to the successor in office of Robert Marr, it would have been an easy matter to have indicated that fact by simply adding the words, and his successor, or successors.

So far as these defendants are concerned, and so far as the evidence in this case is concerned, they contracted for accommodation only, and without compensation, and come within the rule governing voluntary sureties, entitled to have their contract construed by the rule of *strictissimi juris*. With the advent of bonding companies chartered for the conduct of such business and entering into such undertakings for money consideration, a contract

being essentially an insurance against risk, underwritten for a money consideration prepared by experts in that line of business, requiring periodical reports from their principal, and keeping them under constant surveillance, there has arisen the rule of liberal construction of such contracts, but it is only out of consideration of the matters enumerated that the rule of liberal construction relative to compensated sureties has arisen. The rule, like all rules of law, is based upon reason, and where the reasons for invoking it do not exist it does not obtain.

But regardless of which rule is applied to defendants they are at least entitled to have their obligation interpreted by the ordinary rules of law, and they cannot be held liable beyond the strict terms of their contract. Their obligation may not be extended by construction or by implication.

U. S. F. & G. Co. vs. French Mut. Gen. Soc.,
212 Fed. 620.

Gilmore vs. U. S. F. & G. Co., 208 Fed. 277.
American Bonding Co. vs. Pueblo, 150 Fed.
17.

U. S. vs. Freel, 186 U. S. 309, 46 L. Ed. 1177.

Plaintiff in Error seeks to recover from defendants because W. H. Britt, the Treasurer of Thurston County, Washington, lost deposits made by him in the State Bank of Tenino, which it was required to make good under a depository bond executed by it to Britt on June 22nd,

1914, while the bond which defendants indemnified plaintiff against loss under was released in writing and discharged long before the loss occurred, and was specifically referred to in the indemnity agreement, and made a part of it, and provided that it should only stand as security for moneys deposited by Robert Marr, as Treasurer of Thurston County, Washington, and specifically excepted any and every other Treasurer. With these provisions made a part of their contract defendants said to the bonding company, you may renew that obligation; you may extend that obligation; you may execute a new obligation in lieu or in place of it, without giving any notice to us, but they did not any place say, you may execute a similar obligation to whomsoever may succeed Robert Marr as Treasurer of Thurston County, Washington. How can the responsibility of the defendants be extended to a loss suffered by plaintiff under an entirely new, different bond, containing different provisions, given by plaintiff in behalf of the bank to the successor in office of Robert Marr, without extending the terms of their agreement by making a new contract? Plaintiff in Error is asking this Court to write into their contract the words, "his successor or successors," when the parties who made the contract did not themselves see fit to do so, but did specifically provide that it should not stand as indemnity for the loss of any moneys, except moneys deposited by Robert Marr. It may have made a very material

difference in the view of the indemnitors as to the question of their responsibility between the Bank of Tenino and Robert Marr as Treasurer, and the Bank of Tenino and somebody else as Treasurer. They might very well have agreed to make good moneys which Robert Marr deposited in the bank, knowing him, knowing of his prudence, and knowing that he would not deposit money improvidently. These considerations may have formed a material ingredient in the judgment of the indemnitors in entering into this agreement.

As was well said in the case of *Birch vs. De Rivera*, 6 N. Y. S. 206:

“A man may be willing to guarantee A and B, but be unwilling to guarantee A and C; he may be willing to guaranty a firm composed of A and B, but not a firm composed of A and C; he may guaranty solely on the strength of B’s ability or caution. At all events, his contract cannot be altered and extended beyond his consent.”

To the same effect is *Strange vs. Lee*, 102 English Reports Reprint, 682.

In *Meyers vs. Edge*, 101 English Rep. Rep., 960, it is held that a promise in writing directed to A, B and C, a house in trade, to pay for goods to be furnished to another cannot be enforced in an action by B and C to recover the value of goods furnished after A had withdrawn from the partnership.

In the course of its opinion the Court, speaking through Lord Kenyon, said:

“I think that the rule ought to be made absolute. We are to judge on the contract that the parties have made, and ought not to substitute another in lieu of it. . Here the defendant contracted with Meyers, Fielden, Ainsworth & Co. Perhaps the defendant, when he entered into this contract, had great confidence in Ainsworth, and thought that he would use due diligence in enforcing payment of the goods from Duxbury regularly as they were furnished; at least it is too much for us to say that, after Ainsworth ceased to be a partner, the defendant would have given the same credit to the remaining partners. I disclaim going on the grounds of fraud in this case, the jury not having found that there was any fraud. If on a new trial the plaintiffs can produce any other evidence to affect the defendant, they will have an opportunity of doing so. But we cannot say that a contract, that on the face of it imports to have been made with five, ought to be construed to be a contract made with four persons only.”

In *Weston vs. Barton*, 128 English Rep. Rep. 495, it was held a bond conditioned to repay to five persons all sums advanced by them, or any of them, in their capacity as bankers will not extend to sums advanced after the decease of one of the

five by the four survivors, the four then acting as bankers.

Lord Mansfield, speaking for the Court, observed thus:

“The question here is, whether the original partnership being at an end, in consequence of the death of Golding, the bond is still in force as security to the surviving four; or whether that political personage, as it may be called, consisting of five, being dead, the bond is not at an end. The case has stood over in consequence of doubts which the Court entertained on particular expressions in the bond. Many cases were cited at the bar; and the result of them is, that generally when a change takes place in the number of persons to whom such a bond is given, the bond no longer exists. These decisions certainly fall hard on the obligees; for I believe the general understanding is, that these securities are given to the banking house, and not to the particular individuals who compose it; and we should readily so construe the bond if the words would permit. The words of the condition on which the question depends (and which his Lordship now read over), again and again refer to the obligees’ capacity of bankers; they were bankers, only as they were partners in their banking house, as it is called, and this security is conditioned to pay any money ad-

vanced by 'them five or any or either of them.' Taking those last words by themselves, it might at first be conceived that if any one of the five advanced money, this bond should secure it, but the words are afterwards explained, when it is seen that the money is to be paid to the five. Now it could never be intended that money advanced by one of them singly, should be repaid to the five; and this shows that the words 'advanced by them or any or either of them' must be confined in their meaning to money advanced by any or either of them in their capacity of bankers, on behalf of all the five. This, then, being the construction of the instrument, from almost all the cases, in truth we may say, from all (for though there is one adverse case of *Barclay vs. Lucas*, the propriety of that decision has been very much questioned), it results that where one of the obligees dies, the security is at an end. It is not necessary now to enter into the reasons of those decisions, but there may be very good reasons for such a construction: it is very probable that sureties may be induced to enter into such a security, by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things there cannot be a partnership consisting of several persons, in which there are not some persons possessing these qualities in a greater degree

than the rest; and it may be, that the partner dying, or going out, may be the very person on whom the sureties relied; it would therefore be very unreasonable to hold the surety to his contract, after such change; * * * some would permit one who was almost a beggar, to extend his credit, to that sum; others would exercise a due degree of caution for the safety of the surety: and therefore we are of the opinion, that as to such sums only, which were advanced before the decease of Golding, can an indemnity be recovered by the plaintiffs; and as to the sums claimed for debts incurred since his decease, the judgment must be for the defendant."

See also,

Simpson vs. Cook, 130 English Rep. Rep. 181.

To the same effect is *Lyon vs. Plum*, 14 L. R. A. (N. S.), 1231, where the New Jersey Court of Error and Appeals, speaking through Justice Parker, reviewed the American and English cases on the subject, holding that any material changes in the status or composition of the party originally guaranteed will not be covered by the guaranty. The following may be found in the note appended to the decision:

"The case of *Grant vs. Naylor*, 4 Cranch, 224, 2 L. ed. 603, though not directly in point, is of interest in this connection. It was there

held, Chief Justice Marshall writing the opinion, that the firm of John and Jeremiah Naylor & Company could not maintain an action upon a guaranty addressed to John and Joseph Naylor & Company, notwithstanding that the guaranty was really designed for the former firm, for the reason that, the contract being in writing and within the statute of frauds, parol evidence was not admissable to vary its terms. The chief justice, however, remarked that the Court had felt considerable difficulty on the subject; and the decision was influenced largely by the feeling that the tendency to relax the statute of frauds ought not to be encouraged. He pointed out that the case was not one of ambiguity, either patent or latent; and that, if it was a case of mistake, it was a mistake of the writer, and not of him by whom the goods were advanced, and who claims the benefit of the promise."

See also *Crane Company vs. Specht*, 57 Northwestern, 1015, where the Supreme Court of Nebraska speaking through Harrison, Judge, disposed of a similar question in the following language:

" 'A rule never to be lost sight of in determining the liability of a surety or guarantor is that he is a favorite of the law, and has a right to stand upon the strict terms of his obligation, when such terms are ascertained. This

is a rule universally recognized by the courts, and is applicable to every variety of circumstances.' Again it is said: 'A surety, or guarantor, usually derives no benefit from his contract. His object, generally, is to befriend the principal. The guarantor is only liable because he has agreed to become so. He is bound by his agreement, and nothing else. It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal. Being, then, bound by his agreement alone, and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law, and have a right to stand upon the strict terms of his obligation. To charge him beyond its terms would be, not to enforce the contract made by him, but to make another for him.' In *Miller vs. Stewart*, 9 Wheat. 680, Story, J., says: 'Nothing can be more clear, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in the obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be, even, for his benefit. He has a right to stand upon the very terms of his contract, and, if he does not

assent to any variation of it, and a variation is made, it is fatal.' ”

In *Burge on Suretyship*, Chapter 3, it is said:

“A contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time, than is expressed or necessarily included in it.”

And further it is stated:

“In the Roman law the rule now under consideration assumes the form of a maxim, ‘An agreement of guaranty, made with one person, cannot be extended to another person.’ ”

The case of *Mechanics American Bank vs. Rowell*, 182 S. W. 990, recently decided by the Supreme Court of Missouri (1916), is highly instructive on several of the matters advanced by plaintiff in error. We will therefore quote from it at length.

The Mechanics National Bank in consideration of receiving the account of the J. H. Crane Furniture Company extended to the furniture company a credit in the sum of Twenty-five Thousand Dollars on the guaranty of Ellen S. Crane, a large stockholder in the furniture company, which guaranty was as follows:

“Whereas, the J. H. Crane Furniture Company may apply to the Mechanics’ National Bank, St. Louis, Mo., for discounts: Now, for value received, and in consideration of one dol-

lar paid to each of the undersigned, the receipt of which is hereby acknowledged, and other valuable considerations to them moving, I, Ellen S. Crane, jointly and severally for themselves, their executors and administrators, hereby guaranty to said bank, its successors and assigns, the prompt payment as they severally may mature, of all loans made or which may be made to said J. H. Crane Furniture Company by said bank, and of all notes, acceptances and other paper, which have been or may be discounted for the said J. H. Crane Furniture Co. to the amount of fifteen thousand dollars (\$15,000) by said bank, whether the same be made, drawn, accepted or endorsed by said Ellen S. Crane, as well as any renewals thereof; and this is intended to be a continuing guaranty and shall apply to and cover all loans and discounts and renewals so made by said bank prior to notice in writing given to the cashier of said bank, that the undersigned will not be liable upon any such loans or discounts made by said bank after the receipt of such written notice.

Whenever any such loans or paper, or any renewals thereof, shall become due and remain unpaid, the undersigned will, on demand, and without further notice of dishonor or protest, and without any notice having been given to the undersigned guarantors, previous to such demand, of the acceptance by said bank of this

guaranty, and without any notice having been given to the undersigned guarantors, previous to such demand, of the making or renewing of any such loans or discounts, pay the amount due thereon to said bank, its successors and assigns, and it shall not be necessary for said bank, in order to enforce such payment, to first institute suit or exhaust its remedies against said J. H. Crane Furniture Co., or other parties liable on such loans or paper; and notice to the undersigned of the acceptance of this guaranty and of the making or renewing of such loans or paper, and any of them, is hereby expressly waived by the undersigned.

But all paper discounted for said Crane Furniture Company and all loans made to said Crane Furniture Co., when paid, shall be deemed to have been paid by said Crane Furniture Company, unless express notice in writing is given to said bank at the time, by said guarantors, that it has been paid by them.

Executed this 14th day of February, 1905.

ELLEN S. CRANE."

Accepted:

Witness: JOHN R. MYERS.

The bank loaned Twenty-five Thousand Dollars to the Furniture Company. Later the guaranty and notes of the furniture company were delivered to the Mechanics' American National Bank, which was incorporated and sold its stock in exchange for a large part of the assets of the Mechanics' National

Bank, and another institution, the American Exchange Bank. Afterward the Mechanics' American National Bank loaned other moneys to the Furniture Company under the Ellen S. Crane guaranty. The Court denied the bank's right to recover under the guaranty.

In the course of its opinion it said:

"It is next insisted that the parties to the suit placed such a construction on the contract as to 'make it inure to the benefit of the plaintiff bank.' We are unable to assent to that view, in the light of the facts disclosed in the record. It does appear that the plaintiff bank acted upon the assumption that the terms of the written guaranty entitled it to hold the guarantor for loans which it made, and that the president of the furniture company took a similar view, but it was not established by the evidence that the guarantor, E. S. Crane, so regarded her contract, or that she made any representation to the plaintiff that she desired it to be the beneficiary of her written guaranty given to another bank. Mrs. Crane never at any time had any interview with any person representing the plaintiff. She was never seen or spoken to by any officer of the bank as to any transaction between it and the furniture company."

The case of *Saunders vs. Ducker* (Court of Appeals of Maryland, 1911), 82 Atlantic 154, in-

volved a contract more favorable to the plaintiff than the indemnity agreement here, yet a recovery was denied . An indemnity guaranty to cover the sale price of books was given to W. B. Saunders, which among other things provided that it should cover the whole period of the agency, "on whatever agreements, express, implied, altered, renewed or extended which might be made." This indemnity agreement was signed by one of the parties who solicited the agency. Later W. B. Saunders was incorporated under the name of W. B. Saunders Company, taking over all of the business of W. B. Saunders, and it was held that there was no liability.

The case of *Bennett vs. Draper* (Court of Appeals New York), 34 Northeastern 791, is a leading American case on the subject. In this case the guaranty went to H. C. Bennett & Company, their successors or assigns; the partnership of H. C. Bennett & Company was finally dissolved by death, and a new partnership under the same name advanced money under the guaranty. The case is too long to quote from at length.

In the course of its opinion, however, the Court laid down the following rule:

"In the absence of language in the guaranty showing that the parties intended that it should survive changes in the partnership, and inure to the benefit of the new firm as

well as the old, the defendant's contract terminated with the existence of the firm to which it was given. Add. Cont. 655; Story, Partn., Sec. 244-251; *Strange vs. Lee*, 3 East. 489; *Metcalf vs. Bruin*, 12 East. 400; *Schmitz vs. Langhaar*, 88 N. Y. 503."

" * * * It would be quite unreasonable to hold in such cases that a surety intended to contract indefinitely with parties unknown to him at the time, and that his obligation passed unimpaired through all changes and mutations of the firm to which it was given, and that a remote successor of the original obligee, by virtue of a purchase of its assets or otherwise, can use it in the same way as if it was made directly to him, and for his benefit. It cannot be supposed that such a result was within the contemplation of the parties. Nothing can be found in the record that would warrant the conclusion that the defendant contracted to be responsible to the plaintiffs for moneys advanced by them. Her obligation is limited to loans made by the firm, which it may be presumed she knew, and with which alone she had contractual relations. The judgment appealed from is right, and should be affirmed with costs."

It will not be presumed here that these indemnitors intended to bind themselves and their heirs and estates to indemnify the National Surety Com-

pany as long as Thurston County had a treasurer, and as long as the State Bank of Tenino, which was a corporation, existed and received deposits.

The trial court in its opinion (Record, p. 77), very properly found that the indemnity agreement was on a printed form, prepared by the bonding company itself, and therefore should be construed most strongly against it, and that the provisions of the contract should be limited rather than extended, and made the following observations:

“If not so limited, it is not clear but that the indemnitors might be bound so long as the bank continued in business and the county had money to deposit. Such a result would require language more clear and unambiguous. For that reason, I believe that the words about changing and modifying must be given some narrower meaning than they might otherwise have.”

(Record, pp. 78-79.)

In *Barns vs. Barrow*, 61 N. Y. 39, 19 American Rep. 247, the facts show that on October 20th, 1869, John W. Barns, one of the plaintiffs, agreed in writing to furnish Edward Barrow flour and feed to be handled on commission, and the defendant, John Barrow, guaranteed in writing that Edward Barrow should account Barns for the proceeds. Barns was a member of the firm of John W. Barns & Co., which firm, and not John W. Barns, furnished the flour and

feed to Barrow, and now brings action on the guaranty to recover a balance due from Edward Barrow. It did not appear that either Edward Barrow or defendant knew that the goods supplied belonged to the copartnership.

The appellate court in reversing a judgment on the guaranty said:

“The present case differs in an essential particular from those just cited. It is a case of pure guaranty; a contract which is said to be *strictissimi juris*; and one in which the guarantor is entitled to a full disclosure of every point which would be likely to bear upon his disposition to enter into it. The consideration of the contract does not inure to him, but to another. He assumes the burden of a contract without sharing in its benefits. He has a right to prescribe the exact terms upon which he will enter into the obligation, and to insist on his discharge in case those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself upon the technical objection, this is not my contract, *non in haec feodora veni*. Accordingly, in the present case, he may say, ‘I contracted with John W. Barns, and will not be liable for supplies furnished by a firm, though he may be a member of it.’

The authorities, when carefully considered, sustain this conclusion. Mr. Burge, in his

work on Suretyship, chap. 3, discusses this subject at length. He says: "The contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, *to any other person*, or to any other period of time than is expressed, or necessarily included in it. It was in the power of the person accepting the surety to have expressed, and it is his own fault if he has not included *the case to which he seeks to extend the liability of the surety.*"

It is settled by all the authorities that a letter of credit addressed to a particular person is limited to him, and that the writer must be held to have granted it in reliance on the prudence and discretion of the person addressed, and such a letter gives no right to interpose the writer's credit or transmit his guaranty, unless such right is clearly expressed, or necessarily included in it.

Union Bank vs. Coster, 3 N. Y. 203.

Birckhead vs. Brown, 5 Hill, 634; S. C., 2 Den. 375.

Walsh vs. Bailie, 10 Johns 180.

Robbins vs. Bingham, 4 id. 476.

Penoyer vs. Watson, 16 id. 100

In *Daube vs. Philadelphia, etc.*, 77 Fed. 713, the Circuit Court of Appeals of the Seventh Circuit, considered the identical question involved here. It appears that for the purpose of enabling Daube

and Rosenheim to purchase coal on credit from the Philadelphia & Reading Coal & Iron Company, that Louis Daube gave the coal and iron company a written guaranty to the amount of Ten Thousand Dollars, guaranteeing the account of Daube and Rosenheim until revoked by notice in writing. Subsequently a receiver was appointed for the coal company. The receiver made sales to Daube and Rosenheim, relying on the letter of guaranty given by Daube. In holding that the sales made by the receiver were not protected by the guaranty, the Court said:

“The vital question is whether the sales made by the receiver to Daube & Rosenheim were within the scope of the contract of guaranty. They were not within the letter of the contract, and to include them by construction or intentment was, in our judgment, an invasion of the wholesome rule, recognized in the opinion below as elementary, ‘that a guarantor or surety may stand upon the strict letter of this contract,’ and can be liable only ‘within the clear terms of the obligation, and between the identical parties who are named in it.’ Any change in parties or terms, even though beneficial to him, if made without his consent, discharges him.”

“ * * * Is it to be said, in view of the strict rule by which the contracts of suretyship and guaranty are governed, that a guarantor, who

has become responsible for one of the parties to such a contract, is subject to consequences and contingencies dependent upon the election of any receiver who may be appointed for the other party? If such consequences are exceptional, and result, as has been suggested, from 'rules of policy appropriate to the equitable jurisdiction,' protection against them is no less important, and, as we conceive, no less clearly within the guarantor's right to insist upon the letter of his contract, than if invasions of his rights at law were involved."

It is also a well settled rule in the construction of guaranty contracts, that if the language is equally capable of two constructions, one that the guaranty is limited, and the other that the guaranty is continuing, that construction will be adopted which construes it to be limited.

Referring to the rule the Court in *Morgan vs. Boyer*, 48 American Reports 456, expressed itself thus:

"In applying these rules there has been much difference of opinion as to whether the language of a guaranty should be construed as creating a limited or a continuing guaranty, when it is fairly capable of either construction, but we are satisfied that the decided weight of authority is in favor of the rule stated by Judge Story, that in a doubtful case the pre-

sumption should be against the construction that the guaranty is continuing."

See *Cremer vs. Higginson*, Federal Case No. 3383 (opinion by Story, Judge, above referred to).

Merchants National Bank vs. Cole, 93 N. E. 465.

Cheshire Beef Co. vs. Thrall, 47 Atl. 160.

Sherman vs. Mulloy, 54 N. E. 345.

King Co. vs. Ferry, 5 Washington 552.

In this connection counsel cite the case of *United States vs. Bailey*, 178 Federal 302, and *American Surety Co. vs. Campbell*, 138 Federal 531.

(Plaintiff's Brief, p. 46.)

In the Bailey case a railroad company gave a bond signed by the defendant trust company, binding themselves, their executors, administrators, successors and assigns, jointly and severally in the sum of Three Thousand Dollars, to the United States, which the principal and surety, *their successors or assigns*, agreed to pay, etc. Subsequently a receiver was appointed for the railroad company, and while operating the railroad caused a fire resulting in damage to the United States, and an action was brought on the bond. The court was of the opinion that the word "successor" found in the conditions of the bond would hold the guaranty company.

In the Campbell case a bond to discharge an attachment was given to Homer, Receiver of

Campbell & Zell Company, a corporation, to be paid to Homer, his successors and assigns. The corporation was the real party in interest, and the Court held that the term "successor" was not limited to a receiver, but also meant succession to control by the corporation itself on the termination of the receivership.

In the course of its opinion the Court said:

"*Bonds* which provide for and express the idea of *succession in respect* to obligees contemplate that whoever succeeds to the right of control over the right of action involving the subject matter to which the contract relates shall be the obligee, and have a right of action to enforce the obligation."

These two cases relied upon by plaintiff in error are really authorities in defendants' behalf, because in each case the idea of the bonds running to the obligee's successor was clearly expressed. No such provision, however, is made in the indemnity bond or depository bond involved in this action.

Counsel finally contend (Plaintiff's Brief, p. 48), that the County was the real party in interest, and try to pass the situation off by referring to the Treasurer as a sort of a figurehead.

The statute of the State of Washington relative to County Depositories, Section 3943, R. & B. Code, after authorizing the Treasurer to make deposits of

county moneys in banks furnishing security, provides:

“But nothing done under the provisions of this section shall alter or affect the liability of any County Treasurer, or of the sureties under his official bond.”

In *Kittitas County vs. Travers*, 16 Washington 528, the Supreme Court of this state held a County Treasurer and his bondsmen liable for loss of public moneys through the failure of a bank where they had been deposited by the Treasurer with the knowledge, consent and approval of the County Commissioners.

In *Fairweather vs. Hedges*, 14 Washington 119, it was held that a County Treasurer was strictly accountable for all moneys coming into his hands, regardless of what care he exercised in the selection of banks in which to deposit such funds, and this is so even if the County had not provided him with a suitable and safe place in which to keep its funds, so that the question of personal equation enters largely into such a transaction.

The defendants in error could very well say that they had abundant confidence in the personal equation of Robert Marr to the effect that he would safely conserve and care for the public moneys, and would cease to deposit the same with the State Bank of Tenino at any time that such depository would seem to him to be insecure, and

having confidence in his ability in that respect would sign the indemnity bond in question, but would not become so obligated when W. H. Britt became County Treasurer, and entrusted with the same supervision of public moneys as Robert Marr.

Plaintiff in Error, on page 38 of its brief, uses the following language:

“This new or substituted bond was executed on the request of Hays, who was one of them, and was signed by Blumauer as president, and Hays as cashier, both of whom were indemnitors and defendants in this action.”

This is an artful effort on the part of counsel to confound the rights of the defendants in error, Mentzer and wife, Campbell and wife, and Eva Copping, with Blumauer as president and Hays as cashier. As a matter of fact the indemnitors Blumauer and Hays did not appear in this case, and judgment went against them by default, and the issues involved herein are strictly between the plaintiff in error and the indemnitors, who appeared herein, and who do not include Blumauer and Hays. In connection with this it is significant that while the application for the original depository bond, to-wit, the depository bond dated June 22, 1911 (Record, p. 87), contains the recitations that T. F. Mentzer is vice president (defendants' Exhibit "A," Record, p. 125-126), the application for the second depository bond, dated June 22, 1914 (Record, p. 112-113), does not contain such

recitation, and recites that the officers are Isaac Blumauer, president, and W. Dean Hays, cashier (Defendants' Exhibit "B," Record, pp. 130-131). As a matter of fact Mr. Mentzer had resigned as an officer of the bank prior to the execution of the second depository bond (Defendants' Exhibit "E," page 132, Record). The indemnitors appearing herein do not stand in the same position as the indemnitors Blumauer and Hays by any means, and counsel's record herein is of no avail.

Plaintiff in Error pays considerable attention to the seventh provision which provides that it binds the indemnitors, their heirs and assigns forever, until the company shall have executed a release under its corporate seal, attested by the signature of its proper officers, etc. This provision is not enforceable, being contrary to public policy, since the right of a party to waive the protection of the law is at all times subject to the control of public policy, and such right cannot be set aside or contravened by any arrangement or agreement of the parties however expressed.

Fidelity & Casualty Co. vs. Eickhoff, 30 L. R. A. 586.

Fidelity & Deposit Co. vs. Nordmarker, 155 N. W. 669.

Counsel lay considerable stress on the rights of the surety company under the eighth provision of the indemnity agreement (Plaintiff's Brief, p. 26),

which provides that the indemnity shall be available in its behalf for all former or subsequent bonds executed by it. Such bonds, of course, would only be bonds coming within the terms of the indemnity agreement.

In conclusion plaintiff contends that the judgment should be reversed, and the trial court directed to enter judgment in its favor, against defendants for the amount sued for. Its position in this connection is as faulty and erroneous as it is in connection with the other questions discussed. The judgment of the Court was one of dismissal entered on defendants' motion for non-suit, and before defendants had been put to proof on their defense. To enter a judgment against them at this stage of the proceeding would be to deprive them of their day in court, a disposition, which we might add, too often characterizes the conduct of these companies.

In conclusion, we submit, that the parties to this action made their own contract; plaintiff prepared it on its own printed form; it is not general, but is specific and lengthy in its many provisions, and covers almost every possible situation and condition that might arise. The contract by its terms nowhere provides that their obligation may be extended to any other contract, or contracts, than those made between plaintiff and Robert Marr. Defendants for reasons no doubt personal to themselves, did not undertake to be responsible for the

performance of a contract between plaintiff and Robert Marr's successor, or successors, and now that litigation has ensued it is not the province of the Court to step in and make a new contract for the parties to enable plaintiff to recoup its loss.

We most respectfully and earnestly insist that the judgment of the Lower Court should be affirmed.

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